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Attorneys for Defendant AMBU INC.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

THE LARYNGEAL MASK COMPANY  
LTD. and LMA NORTH AMERICA, INC.,

Plaintiffs,

v.

AMBU A/S, AMBU INC., AMBU LTD.,  
AND AMBU SDN. BHD.,

Defendants.

No. 07 CV 1988 DMS (NLS)

EX PARTE APPLICATION FOR  
LEAVE TO RESPOND TO MATTERS  
RAISED FOR THE FIRST TIME ON  
REPLY

Judge: Hon. Dana M. Sabraw  
Date: N/A  
Time: N/A  
Courtroom: 10

AND RELATED CROSS ACTIONS

1 Finnegan Henderson Farabow Garrett & Dunner, LLP (“Finnegan”) and Defendants  
 2 (collectively “Ambu”) seek leave to file responsive papers addressing matters raised for the  
 3 first time in Plaintiffs’ (“LMA”) reply papers. *See, e.g., Vargas v. Gromko*, 977 F. Supp.  
 4 996, 1003 n.10 (N.D. Cal. 1997) (granting leave to file sur-reply brief when legal issue  
 5 raised for first time in reply brief).

6 LMA’s reply papers include a “Supplemental Declaration” of Stephen Marzen, which  
 7 is twelve pages long and attaches nine exhibits. It purports to offer a detailed account of  
 8 communications conveyed at the November 22, 2006 meeting between Mr. Marzen and Ms.  
 9 Ackerman—LMA’s representatives—and Messrs. Jakes and Williamson, and to support that  
 10 account with various documents. This account and supporting evidence was not offered  
 11 with LMA’s motion, and it remains largely inaccessible to Finnegan even now, since only a  
 12 heavily redacted version was served on Finnegan and publicly filed in support of LMA’s  
 13 reply brief. Accordingly, Finnegan has had no opportunity to respond to LMA’s  
 14 presentation of facts and is unable even now to review it fully.

15 When a moving party submits new matter via a reply brief, the Court may in its  
 16 discretion disregard it. In no event should the Court “consider the new evidence without  
 17 giving the [non-]movant an opportunity to respond.” *Provenz v. Miller*, 102 F.3d 1478,  
 18 1483 (9th Cir. 1996) (citation and internal quotation marks omitted); *Daghlian v. DeVry*  
 19 *Univ., Inc.*, 461 F. Supp. 2d 1121, 1144 n. 37 (C.D. Cal. 2006) (same); *In re Pacific Gas &*  
 20 *Elec. Co.*, No. C-02-1550 VRW, 2002 WL 32071634, at \*4 (N.D. Cal. Nov. 14, 2002)  
 21 (same).

22 Finnegan respectfully requests that the Court either disregard Mr. Marzen’s  
 23 Supplemental Declaration or afford Finnegan an opportunity, under an appropriate  
 24 protective order, to review and respond to it within ten days of the Court’s order granting  
 25 leave. As set forth in the accompanying Objections to Mr. Marzen’s supplemental  
 26 declaration, the Court can provide Finnegan and Ambu with due process by allowing  
 27 Finnegan’s outside counsel, Finnegan’s General Counsel and Mr. Jakes and Mr. Williamson  
 28

1 to review those portions of Mr. Marzen's supplemental declaration that are redacted.<sup>1</sup>

2 Finnegan notes that if the Court rules that the ethical wall Finnegan established is  
3 sufficient to deny the motion for disqualification, then this application is moot because the  
4 Court will in that case not need to resolve any factual dispute between the declarations  
5 submitted by LMA, on the one hand, and Mr. Jakes and Mr. Williamson, on the other.

6  
7 DATED: January 8, 2007.

8 Respectfully,

9 SEAN M. SeLEGUE  
10 ROBERT D. HALLMAN  
11 HOWARD RICE NEMEROVSKI CANADY  
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FALK  
& RABKIN  
*A Professional Corporation*

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<sup>1</sup>Even if the Court declines to compel LMA to provide an unredacted copy of Mr. Marzen's declaration to Finnegan, Finnegan requests an opportunity to respond to as much of Mr. Marzen's declaration as is currently available to Finnegan.